

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

UNITED STATES OF AMERICA, ) Docket No. 3:06-CR-719  
Plaintiffs, ) Toledo, Ohio  
v. ) April 25, 2008  
MOHAMMED AMAWI, ET AL., )  
Defendants. )

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TRANSCRIPT OF JURY TRIAL, VOLUME 36  
BEFORE THE HONORABLE JAMES G. CARR  
UNITED STATES DISTRICT JUDGE

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1           THE COURT: Just by way of update, I got your  
2 e-mail, Mr. Sofer, and how much of a residue do you think  
3 we're going to have?

4           MR. SOFER: That's a frightening question, Your  
5 Honor, by residue.

6           THE COURT: If you don't know, that's fine.

7           MR. SOFER: Residue I can tell you that we have  
8 been told by the defense that they plan in their  
9 cross-examination to be using 19 transcripts, essentially;  
10 some of them multiple portions, but 19 transcripts. And  
11 the government has been able to analyze, so far, 14 of  
12 those.

13          THE COURT: Okay.

14          MR. SOFER: And when I say "analyze," we've been  
15 able to check them to see whether or not the transcripts  
16 supplied by the defense varies from the transcripts the  
17 government has, and we've done some analysis by way of the  
18 relevance and the hearsay issues in terms of objections the  
19 government's brought.

20                So the vast majority, I have people working on  
21 them right now. They will bring them done, I was told,  
22 somewhere in the 11:00 to 11:30 range. I think we should  
23 be able to deal with that. I just had a conversation with  
24 Mr. Hartman. I don't necessarily think -- he doesn't  
25 think, nor do I, at this juncture, that audibility is going

1 to be necessary in the sense that the varying -- variations  
2 in transcript -- we haven't really had a chance to talk  
3 about this -- this -- and analysis was just completed. We  
4 think we may be able to work that out. I think certainly  
5 we don't --

6 THE COURT: That's what I'm meaning by the  
7 testimony residue. I don't think The Court needs to be  
8 involved in that yet, and if we have a little time on  
9 Monday set aside in an emergency, we can do a quick  
10 audibility hearing for what I think will be very small,  
11 very few issues.

12 And it turns out that I glanced at my Monday  
13 calendar, and that's the first time in almost 30 years that  
14 I've been here, my Monday afternoon evaporated. Normally,  
15 I have things every half hour, and I've only got one after  
16 about 1:30, 2:00, and that I can either have another judge  
17 handle, or if that's a 4:30 -- so any way -- so I think  
18 starting about 2:00 on Monday, we should be able to tend to  
19 whatever we need to. That's not to say -- it's not that we  
20 can do everything possible today so we know where we are  
21 and what's going on. Okay.

22 Are the defendants here?

23 MR. SOFER: Judge, our understanding was that  
24 Defendant Masloun's attorneys have waived his appearance  
25 and that he will formally do so himself.

1 MR. DOUGHTEN: That's correct.

2 THE COURT: I think Jeff e-mailed me last night,  
3 and I said that's fine. Okay.

4 What I would propose doing would be to -- and  
5 this is subject to whatever counsel thinks would be more  
6 efficient -- to hear the government out or hear the parties  
7 out on the -- the -- its objections to the proposed defense  
8 expert testimony. Make a decision that we, then, turn to  
9 the definitions and see where -- what, if any, sort of  
10 progress has been made and deal with that. And then  
11 there's a matter that you all need to deal with in camera  
12 together.

13 MR. SOFER: Judge, I can speak a little bit to  
14 the second issue, Your Honor, which relates to the  
15 definitions. The government has been working diligently to  
16 work out its own internal issues besides these definitions.  
17 We have made progress, but we have not finished having  
18 those conversations. As I indicated to The Court, I think  
19 earlier in the week I think understandably there are a  
20 number of terms within these definitions that do contain  
21 policy, international affairs conditions in them, and we  
22 have been trying to work that out with, I believe, those  
23 who are paid more money to worry about those things than we  
24 are, and I think we will be able to do that.

25 But I think if The Court would respectfully defer

1 a decision on that. I don't want to end up agreeing to  
2 something that we end up not being able to agree with.

3 THE COURT: No problem at all.

4 MR. SOFER: I think -- I'm sorry, Judge. I  
5 think -- I don't want to violate rule number one. You've  
6 got me frightened by that. We -- the Monday afternoon time  
7 might be the best time to do that. I don't see that as  
8 being a huge time.

9 THE COURT: It does seem to me that whatever we  
10 accomplish with that may have some effect on having  
11 Mr. Kohlmann testify.

12 MR. SOFER: Understood. I'll say this, also,  
13 Judge, Mr. Herdman will expand on this when we get to  
14 hopefully discuss Mr. Kohlmann today. The government's  
15 general position on this is, we have radically narrowed the  
16 focus.

17 THE COURT: Yeah, I saw -- I didn't get a  
18 chance -- I'm having it printed out now, and you can either  
19 wait until --

20 MR. SOFER: Our hope is to be able to stipulate  
21 on as many of these terms as possible, call Mr. Kohlmann  
22 for a very narrow set of purposes that does not relate to  
23 the vast majority of terms, abide by Your Honor's greater  
24 concerns about his testimony, and we have -- and we have  
25 same kinds of objections as obviously the defense experts.

1           THE COURT:   Okay.   At least we've got the  
2 weekend.   You folks to work on your end and you folks to  
3 talk.   Okay?

4           Why don't I hear from you as to the -- you being  
5 institution, whoever wants to --

6           MR. SOFER:   We've each divided up the defense  
7 experts.   I've drawn Mr. -- Dr. Shy, I believe is his name,  
8 Roger Shy, and --

9           THE COURT:   Let me ask you this:   I think I've  
10 got a pretty good grasp and comprehension about the two  
11 being offered on behalf of Mr. Amawi, Dr. Shy.   I'm less  
12 plugged into the vestige reports, so maybe we can put  
13 that -- I just want to let you know that.

14          MR. SOFER:   Understood, Judge.

15          THE COURT:   I think I understand, and maybe,  
16 perhaps, what we should do for that is have Mr. Hartman  
17 tell us what that's about.   We can do that whenever.   Okay?

18          Why don't we deal with -- let's head in the  
19 direction you wanted to go.   That was just by way of FYI,  
20 but that may take more in the way of telling me what it's  
21 all about that's going on.

22          MR. SOFER:   Judge -- and also, Judge,  
23 respectfully, the computer forensic expert, I'm not sure we  
24 have a disagreement with him calling him.   It's very  
25 unclear to us what it is they'll be testifying about, so



1 maybe that's what The Court's saying.

2 THE COURT: I thought it was just my own 19th  
3 Century mindset.

4 MR. SOFER: Speaking of the 19th Century, Your  
5 Honor, I think Dr. Shy is probably the witness that we --  
6 the government institutionally objects to the most here.

7 THE COURT: Let me tell you my view. I really  
8 think the way that the evidence developed that practically  
9 everything that he is saying -- and maybe I should hear  
10 from -- maybe I should lay this out and let Steve speak to  
11 that and maybe go from there.

12 MR. SOFER: If I may, I'll say a little synopsis  
13 of the government's position. It may comport with The  
14 Court's, I don't know. And Mr. Hartman can respond.

15 What I think -- first of all, it is clearly  
16 counted, I believe, six different circuits that have  
17 approved district court decisions to exclude Dr. Shy's  
18 testimony. And although I haven't got a Sixth Circuit case  
19 yet, we're still looking, so it's not impossible that we  
20 will find one.

21 THE COURT: Can we go off the record for a  
22 moment, please?

23 (A brief discussion was had off the record.)

24 MR. SOFER: The rationale behind disallowing his  
25 testimony, I think, that's laid out by most of these

1 reports, fits this case perfectly. There are a number of  
2 reasons why it is. This kind of testimony is highly  
3 inappropriate according to the courts that have excluded  
4 it. Not every court has excluded it, but I would note that  
5 the courts that have allowed the testimony have --  
6 they're -- they've either allowed it -- and often in a  
7 different circumstance -- or for very limited purposes.

8 Here -- there's a couple -- there are essentially  
9 three reasons why it is, and this is laid out, and, Your  
10 Honor, we have the cases here. I'd like to submit them for  
11 The Court. I'll submit them to Your Honor, but the case  
12 I'll -- I'll at least cite for the moment is United States  
13 versus Evans, E-V-A-N-S.

14 THE COURT: Give me one second.

15 And the citation?

16 MR. SOFER: Citation is 910 F.2d 790. And it's  
17 802 through the end of the case, Your Honor, essentially.  
18 It's the 11th Circuit, Your Honor.

19 THE COURT: Page 802.

20 MR. SOFER: And it's a 1990 case. Yes, 802 is  
21 the pen cite. And Judge, here, The Court basically  
22 describes the rules, obviously and specifically, rule 7.

23 THE COURT: Give me a second. I've got to get  
24 into Westlaw.

25 Steve, do you have the case with you?

1 MR. HARTMAN: I do not. First I've heard of it.

2 THE COURT: If you can find copies of the case  
3 maybe.

4 MR. SOFER: I know we have them.

5 THE COURT: Why don't you give them to him  
6 because I can't pull them up. You can't get Westlaw in  
7 here, can you?

8 MR. HARTMAN: Normally, I can, but my dog isn't  
9 running straight, and I'm trying to get it to work.

10 THE COURT: They've got cases that they brought  
11 for me, just give it to them.

12 MR. SOFER: We'll find the case, Judge.

13 THE COURT: Okay. I'm reading. Just a minute.

14 MR. SOFER: Here they are. Unfortunately, we  
15 only brought a set for The Court. Well, then, if Your  
16 Honor -- I can give you my -- if counsel doesn't disagree,  
17 I can -- I'll give you a list, Judge, if you can read my  
18 chicken scratch, you'll -- or I can also read them into the  
19 record. It's up to you. In any event, Your Honor --

20 THE COURT: Let me -- just give me about two  
21 minutes to glance at it. And let me say, for several  
22 reasons -- and I think I've alluded to this and I think  
23 I've actually made quite clear -- I expect that both -- all  
24 parties, both sides will have a broad opportunity to play  
25 stuff during closing argument, and however you want to

1 present the transcribed versions, either through a scroll  
2 mechanism or a copy or, perhaps, even both so the jurors  
3 can choose which to watch, because the problem I have is  
4 following the conversation was some problems from time to  
5 time wasn't so much the audibility with the transcript as  
6 so often happens, something is seen difficult to hear when  
7 you have the transcript, oh, yeah, fine, okay. Yeah, okay.  
8 And the problem was I -- I frequently have -- just because  
9 my eye wouldn't move as quickly as the scroll and sometimes  
10 it would and sometimes it wouldn't.

11 But I think given the way that these  
12 conversations are at the core of the case for everybody, I  
13 expect that you guys will be able to project and present  
14 whatever conversations you want, and it's in anticipation  
15 of that that is part of my thinking.

16 And any way, give me another minute for Steve and  
17 I to read this.

18 Steve, let me know when you're done. Take your  
19 time.

20 MR. SOFER: I would note, Your Honor, while  
21 Mr. Hartman's reading this that this case cites a number of  
22 other important --

23 THE COURT: I saw that, and candidly, those are  
24 exactly the points that it makes, are exactly my concerns.

25 MR. SOFER: Understood. And I'll give a brief

1 description why the government thinks this is important and  
2 then I will sit down. I think that was rule 2, Judge.  
3 Know when to sit down.

4 THE COURT: You ready?

5 MR. HARTMAN: I am. You said there were three  
6 issues -- just go ahead.

7 MR. SOFER: The case talks about a number of  
8 reasons why The Court properly excluded Dr. Shy's testimony  
9 or this kind of testimony. I think some -- although  
10 Dr. Shy is concededly appears to be, I've done some  
11 research -- he appears to be -- I think the line I read  
12 somewhere is he is to linguistic discourse analysis as the  
13 same as Barry Sheck is to DNA evidence.

14 I don't know if I would consider that necessarily  
15 a compliment, but nevertheless, the fact of the matter is  
16 that I don't --

17 THE COURT: You'll be comforted to know that  
18 Mr. Sheck was unsuccessful, but we remain on good terms.  
19 He's a very impressive guy.

20 MR. SOFER: Yes, he is, I didn't mean to  
21 suggest --

22 THE COURT: Not at all.

23 MR. SOFER: The -- what this court focused on, I  
24 think, and the reason I chose to bring this particular case  
25 out of the many cases in which the expert testimony has

1    been excluded, is it really, I think, pinpoints the  
2    problems here.

3           The Court -- basically, there are a number of  
4    reasons why this kind of testimony is problematic. First  
5    of all, it sort of assumes that the jury can't figure this  
6    out themselves, and in some sense is -- and we've done some  
7    preliminary research about this -- in some sense it almost  
8    seems to imply that the jury's not smart enough to figure  
9    out when somebody's sort of guiding a conversation or  
10   manipulating a conversation. And -- and counsel already  
11   has -- they've opened, as Your Honor said, they're going to  
12   have free rein in closing, which is another thing that's  
13   mentioned throughout the case.

14           THE COURT: And during the presentation of the  
15   case.

16           MR. SOFER: Indeed, they already have, and I  
17   think that's the next thing we're going to turn to, which  
18   is the cross-examination of the record which has conceded  
19   many of the points that counsel's trying to make about  
20   whether or not he sometimes would -- would sometimes would  
21   dominate a conversation, sometimes might interrupt, and  
22   again --

23           THE COURT: Overtalker.

24           MR. SOFER: He said he was an overtalker. He  
25   used words that the defense, no doubt, can make their

1 arguments from. I don't think that in a case like this  
2 with this volume of material and given the latitude that  
3 counsel has to make these arguments, that expert testimony,  
4 particularly when you look at the report in this case,  
5 which doesn't -- which basically says, in the end, the  
6 conclusion that the government -- I go back to the analogy  
7 of the two, I believe it's trains in this case passing in  
8 the night. That is -- in essence, is the ultimate issue in  
9 the case.

10 It's a conspiracy case. It requires not  
11 necessarily that. In fact, it's impossible that it's only  
12 the government's cooperating witness and Mr. El-Hindi, who  
13 understood each other, but we're talking about whether  
14 people agree to do something. And that's in another  
15 undercurrent throughout these cases, including the case  
16 I've cited here, Your Honor.

17 And this goes throughout all expert testimony  
18 that you don't want an expert's opinion to substitute for  
19 that of the jury because the province of the jury. And it  
20 is a great danger, it seems to me, Your Honor, to have a  
21 witness come up and basically say, these two people didn't  
22 understand each other. They were talking about different  
23 things. I don't -- I don't think -- I don't think that's  
24 an appropriate thing to be telling a jury at all. Again,  
25 counsel can make those arguments, and they have plenty of

1 ammunition.

2           As Your Honor said, the government -- the tapes  
3 are the tapes. They are what they are. If there are good  
4 things in the tapes, bad things in the tapes, those are --  
5 that's what the trial has been about so far and will  
6 continue to be that way.

7           In any event, the danger of confusing a jury is  
8 very high by bringing this kind of testimony in. And you  
9 very much tempt the jury to substitute the expert opinion  
10 for their own. And that's, I think, highly inappropriate  
11 as well.

12           And again, the case here basically said in this  
13 case -- this is from the Evans case -- in this case  
14 questions regarding the defendant's understanding of  
15 illegality of the operation and the extent of the  
16 government inducement were the center of the trial. The  
17 jury's task was to determine on the basis of its collective  
18 experience and judgment what Evans' state of mind was when  
19 he accepted the money and whether he was entrapped to  
20 committing the crime for which he was charged.

21           We agree with the district court that the expert  
22 testimony would have aided the jury in performing this task  
23 and that the testimony presented would not have aided the  
24 jury.

25           THE COURT: Time out. Reduce the speed.



1 Right, Angela?

2 MR. SOFER: We agree with the district court that  
3 expert testimony would not have aided the jury in  
4 performing this task and that the testimony presented a  
5 risk that the jury would allow the judgment of the expert  
6 to substitute for its own. And I think those are the facts  
7 we have here.

8 I would note, also, that if -- and I think  
9 actually Dr. Shy, I believe, testified in many, many cases  
10 across the country in -- many in state court, some in  
11 federal court, and again, for limited purposes. I don't  
12 know that he's ever testified for the prosecution, that's  
13 an issue that would come up if it were that he could be  
14 cross-examined.

15 But I think -- I think the -- once again, The  
16 Court -- of problems of this kind of testimony are  
17 magnified if -- if we say, then, the government would then  
18 be able to -- and this is exactly what we'll have to do if  
19 it turns out that we go down this road -- we're going have  
20 to look for an expert who will then say what -- that the  
21 defendant understood what it is that the government's  
22 witness was saying, that the defendant did agree with other  
23 people, that they weren't of the same mindset. I mean,  
24 that shows a -- sort of the -- again, it goes to the  
25 ultimate issue of the case.

1           THE COURT: In other words, a problem which I  
2 hadn't thought of, quite candidly, I think it is one. The  
3 government would be unable to prevent -- present rebuttal  
4 testimony because that testimony, by its very nature, would  
5 take over the province of the jury and basically have an  
6 expert telling them, go ahead and convict.

7           MR. SOFER: That's right. That's right. And  
8 that's essentially -- again, it's why in most of these  
9 cases, courts have been very hesitant. Even The Courts  
10 that have allowed it, have limited it greatly. And I just  
11 don't think in this particular trial, given the focus and  
12 the type of evidence we have here, it's also -- you could  
13 imagine if there was some hypertechnical terms or if this  
14 was the -- frankly, if the government's witness --

15          THE COURT: If I can interrupt. If it were a  
16 case in which -- I realize we have foreign language terms,  
17 but if this were a case in which uncommon -- there was an  
18 uncommon -- there was an allegation of coded conversation  
19 in a very uncommon way where, drug cases, it's pretty  
20 readily apparent when we're talking about whatever shirts  
21 or, you know, hub caps or whatever the deal is, but it's a  
22 real dispute, for example, felony. The target really was  
23 in that particular -- was a laundry, you know, clean tops  
24 and shirts, and the government was contending, I suppose,  
25 then, you might well say, okay, because of the speech

1 patterns and so forth, this really isn't the code. The  
2 real business that's going on, but again, I think --

3 MR. SOFER: Dr. Shy's own report describes both  
4 parties to the conversation as being not particularly  
5 articulate. Once again, I think given the facts of this  
6 case, the -- these jurors can figure this out. They don't  
7 need Dr. Shy to tell them that. The other thing that I  
8 would note is that counsel clearly has had access to  
9 Dr. Shy, was able to use his information in guiding their  
10 cross-examination.

11 THE COURT: Do you -- I notice in the Evans case  
12 there's a reference to charts. Are you going to -- and if  
13 you don't want to say right now, but it would seem to me --

14 Let me say this: That if you were to be using  
15 materials that he prepared about attribution and, say,  
16 prepared by Dr. Shy, Georgetown University linguist to what  
17 Barry Sheck is to DNA, would you say, ladies and gentlemen,  
18 here are 17 times, we all know about, ladies and gentlemen,  
19 some of these recorded conversations.

20 It's common sense that they're in a position to  
21 direct the conversations in ways that otherwise might not  
22 occur. They have certain -- it's on their mind that that's  
23 where they want to go. It has certain objectives where  
24 sure sometimes people do want to -- conversations and  
25 sometimes they don't. And they're in a position to steer

1 the conversation to a particular territory that -- that  
2 might not otherwise take. And ladies and gentlemen, you  
3 know, let me play for you two, four, six, eight, 25 times  
4 or even have transcript excerpts on the dates and say,  
5 look, ladies and gentlemen, you'll recall from what you  
6 heard that this happened in that conversation, and there  
7 also, ladies and gentlemen, it is a contention that efforts  
8 of interjection often didn't work or resulted in kind of  
9 ambiguity, the government's now telling you, hey, convict  
10 on that basis. Well, let's look at how frequently that  
11 was, the ways that it happened.

12 It would seem to me that you can, if you're able  
13 to do so, create the kind of demonstrative exhibit in  
14 closing argument. I don't think it would be properly  
15 admitted for the jury. Might want to say, Judge, let us  
16 send these back, perhaps a cautionary instruction. Have  
17 you thought about that?

18 And again, if you don't want to say, that's fine.  
19 But it would seem to me that there are ways that you can  
20 extract out the kinds of -- the evidentiary basis to make  
21 the kind of summary that you would be making in closing  
22 argument.

23 MR. HARTMAN: We have thought about that. We  
24 have thought about it. That's as much as I do want to say.

25 THE COURT: Of course. And I'm trying to signal

1 to you sitting up here and the government say time out,  
2 Judge. But if based on the evidence, this is standard  
3 chart summary that you could use to make your points,  
4 whatever they are, and I honestly think that you can make  
5 them -- the material is there for you to address the jury  
6 as to everything that he says in a way that's  
7 comprehensible to the jury, and doesn't require you to be  
8 an expert or a witness. Common sense.

9 Let me see if Mr. Sofer has anything else to say.

10 MR. SOFER: Only with respect to the last piece  
11 of what you said. Again, counsel using -- doesn't use an  
12 expert always to testify -- it's clearly obvious to me  
13 having read throughout Dr. Shy and having watched what  
14 counsel's doing here, they've already utilized his skills  
15 and talents. I agree that they'll be able to make whatever  
16 arguments they want.

17 The only thing I would say is, I don't think  
18 those kind of demonstrative exhibits go back with the jury.

19 THE COURT: I tend to -- I'm just saying that's  
20 --

21 MR. SOFER: If Your Honor thought about doing  
22 that, I would create my own demonstrative exhibits  
23 otherwise. So the bottom line, again, is that's down the  
24 road -- but I think, again, it goes to this notion that  
25 what really is going on, ultimately relates to sort of

1 common sense and judgment by the jury and not by an expert  
2 witness. And in this case, given its specific facts,  
3 particularly true.

4 MR. HARTMAN: First of all, the -- Mr. Sofer is  
5 correct that we have already begun to cross-examine  
6 Mr. Griffin based on some of the things that Dr. Shy would  
7 draw the conclusions upon, and he has made some admissions  
8 on things. However, the issue really about his testimony,  
9 the types of techniques, the conversational techniques that  
10 were used by Mr. Griffin are much, much more technical than  
11 just, well, he tried to get him to say Bob, but he said  
12 Bill. And what Dr. Shy explains is how technical they are  
13 and how they work. And his --

14 I mean, we, you're right, we could sit here and  
15 play every tape for the jury and point out every time we  
16 think Griffin manipulates and be here until Christmas and  
17 do all those things, but -- but I think it's -- first of  
18 all, this is the more efficient way to do it I believe,  
19 Judge. I don't believe that the things that he would  
20 testify about are within the province of the average person  
21 because of the technical nature of the way they have it.  
22 They are -- it's not just -- well, when you said that it  
23 was -- it was ambiguous. There are techniques that he  
24 describes in his book that -- that have -- that are beyond  
25 the normal understanding of what you and I would think of

1 when we listen to a conversation. And given the  
2 opportunity to explain that, I think the jury would be  
3 able, then, to -- to understand the techniques that were in  
4 fact being utilized that's beyond just the fact that, well,  
5 I'm an overtalker or I'm proactive.

6 Obviously, Griffin said things that are good for  
7 the defense already. And there are tapes that are good for  
8 the defense. But to be able to explain the technical  
9 nature of how these things happen in conversation, I think  
10 it's perfectly appropriate to show the jury exactly why the  
11 conversations progress the way they did.

12 As for -- as for the -- I mean, I can't really --  
13 the case -- the Evans case that Mr. Sofer pointed out,  
14 there's an issue about the conclusion, the ultimate issue  
15 in the case and that he points to trains passing in the  
16 night. I would agree that we shouldn't have an -- an  
17 opinion on whether or not there was an -- an overall  
18 agreement from an expert. However, in specific instances,  
19 to be able to explain the what is really a somewhat  
20 professional methodology used by Griffin.

21 THE COURT: I think what you're saying is that he  
22 would testify to a reasonable degree of expert certainty  
23 that where particular kinds of conversational patterns are  
24 detected, the probability of mutual comprehension decreases  
25 what -- what it otherwise might be or something of that

1 sort? And maybe I'm missing the target.

2 MR. HARTMAN: In some instances, I think that's  
3 correct. I -- this is -- I'm in a bit of a disadvantage,  
4 because Chuck was handling this, and we probably would like  
5 the opportunity to brief the issue for Your Honor, but I  
6 know that there are -- it's -- it's highly technical. His  
7 book about creating language crimes is highly technical in  
8 terms of how conversations get manipulated. It's more than  
9 just what was said on the tape. The issue is how does the  
10 conversation get used. And it's things that you and I may  
11 use every day, but we don't understand them because we've  
12 never looked at them in terms of technical nature of it.

13 THE COURT: Why can't you take some or many of  
14 his conclusions -- I begin with the proposition that what's  
15 going on can be described in the kinds of general terms  
16 manipulations, change of topic, ignoring responses, lack of  
17 response to -- lack of a -- lack that the parties clearly  
18 were talking about the same subject, even though some of  
19 the terms they were using may have been the same, the  
20 distraction, the -- particularly with regard to your  
21 client, the very favorable depiction of him in terms of  
22 what he was mostly about, which is figuring out new ways of  
23 making money, that's what Mr. Griffin acknowledged, and he  
24 even acknowledged that.

25 And I just can't recall, but yesterday



1 afternoon -- but why can't you, then, as an -- say this is  
2 what's going on, without saying this is what experts say.  
3 Just -- I don't see the gap between his book and his  
4 report, but I don't see the gap between what we all are  
5 hearing and what we've been reminded of and the -- the  
6 descriptions that he gives to it and you want to have given  
7 to it. I don't see the gap between his doing so and you're  
8 doing so because I think that they're pretty commonsense  
9 notions. And one looks at things and listens to things and  
10 hasn't been pointed out at -- what is sought to be  
11 accomplished by calling him, can largely be accomplished  
12 through advocacy and a demonstrative aide. And to the  
13 extent that it can't, then we have to go out into an area  
14 of speculation and, I think, some uncertainty.

15           And there's also the issue -- I think it's a fair  
16 issue -- for the government to point out -- just go out and  
17 get a linguist from somewhere who comes in and says, no,  
18 that's -- that's not so in this case. There's ample  
19 opportunity, people did know what they were talking about.  
20 There was concurrence in -- you look at the overall context  
21 and the background and circumstances, the whole  
22 relationship was developing, sure, even though Griffin was  
23 bringing in the subject, let's go training, let's go  
24 shooting so forth and so on. Nonetheless, there was a  
25 common platform of understanding from which they had begun

1 in view of prior conversations.

2 They wind up, ultimately, with a pretty complex  
3 dispute that I think really vastly -- potentially, vastly  
4 complicate -- I think there's a pretty simple proposition.

5 Now, the academic conclusions that are drawn as a  
6 sociolinguistic conversation and linguistic researcher for  
7 a career of 20 or 30 years may be clothed in a kind of  
8 complicated jargon, but that's not at all uncommon. And  
9 I'm not sure that that gets us anywhere or gets the jury  
10 anywhere or gets you anywhere.

11 MR. SOFER: Your Honor, just one -- there's just  
12 one -- what Your Honor said has one further clause to it,  
13 which is -- and that is the province of the jury, what it  
14 ends up doing is treading on the province of the jury,  
15 because they are determining the matter, and that is why so  
16 many courts have excluded it. You end up treading on their  
17 province, it's exactly what the rule and conference and The  
18 Court do not want expert testimony to do.

19 MR. HARTMAN: I don't doubt, Judge, that he's  
20 been excluded from some cases. I -- I haven't checked, but  
21 I would take Mr. Sofer's word because I don't think he  
22 would mislead The Court, but also a number of cases that  
23 he's been admitted for this very purpose. And it's about  
24 using -- and it's about how -- how law enforcement uses and  
25 misuses language in very technical, technical terms, that

1 I, frankly, cannot explain. I think so perhaps what we'll  
2 need to do and what we would request to do is the  
3 opportunity to proffer his testimony for The Court so the  
4 judge -- so The Court can understand that he's not just  
5 pointing out where there is manipulations, but he's  
6 pointing out how that manipulations happens in technical  
7 ways that the average layman just doesn't understand.  
8 Frankly, the fact that the government says, well, then we'd  
9 have to go get our own expert witness that would have to  
10 say, no, it didn't happen that way, is --

11 THE COURT: Such is life.

12 MR. HARTMAN: Such is life. And frankly, from a  
13 defense point of view, is exactly why I'm going to say this  
14 guy didn't commit a crime. But to explain it from an  
15 expert who understands the very technical nature of how  
16 language gets used, I think it's very important so the jury  
17 really understands, because his lawyers standing up and  
18 saying, you know what he suggested, he went shooting 14  
19 times. Okay. He suggested, he went shooting 14 times, but  
20 he also said things on the tapes that made it sound like he  
21 wanted to get involved with whatever Mr. Griffin was  
22 understanding.

23 Now, an expert can explain that conversation and  
24 say, ladies and gentlemen, the technique that was used  
25 there to get to this was X, Y, and Z. The jury can then

1 decide if that's correct or not when they listen to the  
2 conversation. That's correct, but I can't do that. I  
3 can't make that argument as his lawyer.

4 MR. SOFER: And essentially, once again, Judge,  
5 as technical as the subject may be that Dr. Shy has largely  
6 developed, I think it is -- it is what it is; the notion of  
7 whether someone understands something or doesn't, whether  
8 someone has agreed to something or hasn't, isn't what this  
9 case is largely about. And to have someone start using,  
10 you know, all these various terms that they've come up with  
11 to describe the -- if nothing else is clear, I think Your  
12 Honor's watched the testimony, Mr. Griffin is not --  
13 there's no technique -- technical techniques to what he's  
14 doing, I think that's fairly clear from the evidence.  
15 Someone else can come in here and describe it in very  
16 technical terms. But what he's doing is very clear.

17 The jury, again, they're -- they are bright  
18 enough to understand this. They don't -- and counsel can  
19 make the very arguments that he just did. Counsel can make  
20 the arguments Your Honor has proposed that he could make.

21 If -- if you want to bring -- bring a witness in  
22 here that says, I didn't understand what was going on, then  
23 you have to call your client. That's -- that's -- that's  
24 the way this works. If you want to have someone, say,  
25 testify to their state of mind whether they understood,

1 whether there was a meeting of minds, I didn't understand  
2 this, I didn't know what he was talking about, he kept  
3 saying this, I didn't understand what he meant, you have to  
4 call your client. That's what happens in criminal trials.  
5 You don't get an expert witness to come in here and say  
6 what your client agreed to, didn't know, knew, didn't know,  
7 intended to do.

8 MR. HARTMAN: That's not expert testimony, by the  
9 way.

10 MR. SOFER: Ultimately, that is -- oh, that is  
11 the direction that this goes, and that's why it's so  
12 potentially confusing and problematic to have someone come  
13 in here and testify like this. I don't want to call an  
14 expert, I don't even know if such an expert would -- expert  
15 to testify for the government.

16 I know Dr. Shy was consulted for the government  
17 here and there, but in his 500 cases, or whatever it is  
18 that he lists on his resume, I don't think he's ever  
19 testified for the United States government or any other  
20 government entity. He makes a living, essentially, out of  
21 introducing this kind of doubt. The book is for defense  
22 practitioners for the most part. And I just don't -- I  
23 think it's -- I think that it is very dangerous, confusing,  
24 and unnecessary argument to be made in this case to  
25 substitute his opinion for something that a jury is

1 supposed to be determining itself.

2 MR. HARTMAN: And I -- I would argue that if it's  
3 something that should be within the province of the 12  
4 people who sit on the normal jury, then why does the FBI  
5 hire him to analyze things for them? If, you know -- and  
6 they do, and he does work for the government --

7 MR. SOFER: If you look --

8 THE COURT: What matters --

9 MR. SOFER: If I'm sorry, Judge.

10 THE COURT: What matters is what this case  
11 contains.

12 MR. SOFER: I will say, Your Honor, that if you  
13 look at why he did consulting with the government is a  
14 different --

15 THE COURT: Yeah, I don't even want to hear that.  
16 Probably without constructing already further, the jury  
17 being with us and hearing testimony and so forth, what --  
18 what beyond what he has to say here will you anticipate I  
19 would hear further if he were to come testify?

20 MR. HARTMAN: I would anticipate that you would  
21 hear about -- and again, Mr. Boss can answer this question  
22 much better than I can, but I would anticipate that you  
23 would hear about the technical nature of conversational  
24 techniques that you use every day but don't --

25 THE COURT: Excuse me for interrupting. You

1 know, that would be appropriate, it seems to me, where you  
2 have Mr. Griffin having been trained in these techniques  
3 where -- where, you know, the FBI had an informant -- where  
4 they took them for a week and said, look, you know, here's  
5 how you go about getting people to incriminate themselves,  
6 here's how you go about conducting and controlling a  
7 conversation. Here's how and when you should interject  
8 ambiguity so that, you know, you might both be using the  
9 same term or thinking on the same topic to the same thing,  
10 but -- and then you over a period of conversations, you  
11 convert the ambiguity and the precision to reach an  
12 agreement to do a certain thing. There's none of that.

13 MR. HARTMAN: He did say he received training  
14 when he was in the military on these issues, and he said he  
15 couldn't describe the training, but it was -- had Special  
16 Forces or Green Beret school and he did receive training.  
17 Part of --

18 THE COURT: If I recall, gathering information.

19 MR. HARTMAN: -- what he calls --

20 THE COURT: If you want to ask him whether he  
21 received training in manipulations of conversations in an  
22 undercover capacity when he was, quote, charged with,  
23 quote, gathering information about possible criminal  
24 conspiracies. And even if you want to do that in a voir  
25 dire setting outside the hearing of the jury, that's fine

1 for the -- if the premise I was just elaborating on was  
2 wrong, then there may be something else. I doubt if it is,  
3 but I certainly say it's appropriate to say let's find out.

4 MR. HARTMAN: Well, and I think that, you know,  
5 the fact that the FBI didn't tell -- didn't tell him how to  
6 do or not to do these things is obviously going to become a  
7 big issue. But Dr. Shy can explain conversational  
8 techniques we use every day. We don't even know we're  
9 using them. And how they work and why they work.

10 THE COURT: But again, doesn't that -- the more  
11 of that we get, doesn't it get pretty quickly and pretty  
12 thoroughly into the issue of Dr. Shy, in fact, saying,  
13 ladies and gentlemen, convict because -- acquit because  
14 there wasn't any agreement here and -- in other words,  
15 isn't there -- isn't that, as Mr. Sofer points out very  
16 dangerous and inappropriate?

17 MR. HARTMAN: No. I think that's what we argue  
18 on closing based on what Dr. Shy says about his analysis of  
19 specific conversations. I don't think he says that.

20 MR. SOFER: Which is exactly why, again, counsel  
21 can make these arguments. Counsel just said he's going to  
22 testify about things we do every day that we don't even  
23 know we're doing. I mean, it's -- it's such an amorphous  
24 and -- and -- on the one hand, and it's a technical and  
25 amorphous concept, something we do that we don't know we're



1 doing, on the other hand, it's simple.

2 Every day you're going to instruct this jury,  
3 every day you go out and decide whether you believe  
4 somebody, you use your common sense. That's what a jury  
5 does. It uses its common sense and its experience. That's  
6 what this case talks about, the common sense and the every  
7 day knowledge of the jury that is supposed to be assisting  
8 them in determining what happens in a case.

9 What, instead, you have here, is a person that  
10 will come in and describe -- he's come up with all these  
11 terms for what we do every day, the driveby's, the  
12 camouflage, it's a misdirection, it's a recycling.

13 I mean, again, given the way the testimony has  
14 come out, given what the tapes are, we don't need that,  
15 Judge. We can make these arguments. It's very simple. He  
16 didn't understand. It's Mr. Griffin who's guiding the  
17 conversation. Mr. Griffin suggested this, he suggested  
18 that. Here's an example of this, here's an example of  
19 that. They've cross-examined him on this already.

20 In some way, it's most illustrative. Did you  
21 intend to camouflage the situation? Nobody knows what that  
22 means. You can say to someone, did you try to manipulate a  
23 conversation to get him to say something incriminating?  
24 They've asked him that question.

25 Again, to have this hypertechnical amorphous

1 concept on things we do every day that we don't even know  
2 what we're doing, it just injects confusion into the case  
3 that does not belong in there.

4 And it is, I believe, injected to do exactly  
5 that, to -- injected to confuse the jury so that they can  
6 be -- have a difficulty in trying to figure out what  
7 happened. And he actually -- Dr. Shy, allows his ability  
8 to take a, you know, a tape that says this, this, and this  
9 and get an acquittal. I just don't think -- I think it's  
10 highly -- it's dangerously speculative.

11 The case law supports that position, Judge. The  
12 circuits that have looked at this, all those circuits have  
13 looked at this and said, the district court was right, it's  
14 not going to make the case more efficient, it's going --  
15 going to make it a lot less efficient. We're going to end  
16 up in a battle of the experts as to what the defendants  
17 understood. I think that sums it all up.

18 It show -- it shows the imprudence of going down  
19 this road. We're going to end up having a battle of  
20 experts as to what people actually understood. Again,  
21 people who know -- Mr. Griffin knows what he said.  
22 Mr. El-Hindi knows what he understood. You aren't going to  
23 call an expert witness in here to get in the way of that.  
24 That undermines the whole -- the whole concept behind a  
25 trial, and it undermines the jury's functions.

1           MR. HARTMAN: I think Mr. Sofer just provided the  
2 point perfectly when he said nobody knows what camouflaging  
3 is. Well, Dr. Shy's going to get on the stand and explain  
4 what camouflaging is so that 12 laypeople understand it and  
5 when they hear it, they're going to say, ah-ha, I see  
6 exactly what they're talking about now. Because nobody  
7 does understand what examining means, it happens all the  
8 time, and I think we need an expert to do that.

9           And if we need to, you know -- if Your Honor is  
10 leaning towards excluding him, I would ask for the  
11 opportunity --

12           THE COURT: Which I am, go ahead.

13           MR. HARTMAN: I picked up on that. But I would  
14 ask for the opportunity to have proffer his testimony to  
15 show The Court exactly what it's going to be.

16           THE COURT: How soon can that be accomplished?  
17 And how long do you think it would take?

18           MR. HARTMAN: I think it would take a half a day,  
19 and I don't know how soon it could be accomplished, maybe  
20 next weekend. I would have to talk to Dr. Shy.

21           THE COURT: I'm out of town next weekend. I'm  
22 speaking in a conference in New York City on Saturday,  
23 leaving late Friday afternoon, and gone until Sunday night.

24           MR. HARTMAN: Okay. I don't know, you know,  
25 maybe -- I don't know, I would have to talk to him. Maybe

1 we could set something up by teleconference. I don't know.  
2 I would do what I --

3 MR. SOFER: Judge, I'd ask The Court to make a  
4 decision today. I think -- I think it's -- I think the law  
5 is clear, the circuit courts have affirmed district courts  
6 opinions in this circumstance.

7 THE COURT: I'll tell you what I'm going to do.  
8 In all candor, I don't want to wake up one morning and  
9 finding out that I should have allowed this proffer and but  
10 for that, the case was fine.

11 MR. SOFER: I ask The Court to, then, read the  
12 cases that the government submitted.

13 THE COURT: I will.

14 What I propose to do, you get on the phone and  
15 see whether -- I think your suggestion about trying to do  
16 this perhaps by video conference would be -- is a very  
17 sensible -- just given the facts in terms of his time in  
18 particular and his availability, and just so that you are  
19 aware, this Monday afternoon or evening, the 28th --

20 MR. SOFER: Judge, again if I may, an if we're  
21 going to have what amounts to a Daubert hearing on this man  
22 and we received the report, I don't know, two weeks,  
23 saying, if that, where counsel, for instance, had months to  
24 prepare for a Daubert --

25 THE COURT: Hold on one second. I'm trying to

1 respond by indicating my availability to your desire to get  
2 this resolved as promptly as possible.

3 MR. SOFER: I understand, Judge, but if Your  
4 Honor is going to open the door to essentially what amounts  
5 to a hearing on this, I'm concerned about the expert  
6 testifying, the government not having an opportunity to --  
7 I think this could be resolved now, today, I'm comfortable  
8 with that. I've looked at these cases, the government's  
9 looked at these cases, we think this is a relatively easy  
10 issue.

11 THE COURT: I'll tell you what I'm going to do.  
12 I am going to try, if I can, because I have other  
13 commitments, to read the cases. And if I am comfortable  
14 making my mind up on that basis, I will do so, but in the  
15 meantime, can you at least find out what his availability  
16 might be -- and for that purpose, that would be Monday  
17 afternoon on the 28th. By evening, I mean starting 4:30,  
18 5:00.

19 MR. HARTMAN: He lives in Montana so it would be  
20 earlier there anyway.

21 THE COURT: Yeah, and Tuesday, Wednesday the  
22 30th, Thursday the 1st, probably starting around 5:30, and  
23 then evening of Tuesday, May 6th, May 7th, Wednesday, I'm  
24 not available the evening of the 8th, and I'm out of town  
25 on the 9th. The morning, May 12th, but I must leave. I've

1 got important meetings in Cleveland starting at noon, so  
2 I'd have to leave shortly before 10:00.

3 MR. HARTMAN: That would be probably a little  
4 early for him, judge. He's mostly retired, so I think  
5 you've given me enough options that we can probably --

6 THE COURT: At least you can let everybody know.  
7 That doesn't mean I'm going to set the hearing or we'll  
8 hold a hearing. Concurrently, I will be spending time  
9 reading the cases.

10 MR. HARTMAN: I also would like the opportunity  
11 to provide The Court with some cases as well. If we can do  
12 that, yet, and then brief the issue.

13 Just so I'm clear, the -- are we talking about  
14 qualification or admissibility?

15 THE COURT: I don't think it's qualification.  
16 Basically whether or not what he has to say has enough of  
17 the case in light of the considerations and concerns  
18 Mr. Sofer has, and that I have to justify him testifying.

19 MR. HARTMAN: Okay.

20 MR. SOFER: And Judge, I don't dispute that he is  
21 qualified in this area, but I think there is a -- based on  
22 the research and literature that we've been able to find,  
23 there is some significant question as to whether this  
24 constitutes an area which is properly expert testimony. So  
25 I'm not doubting that he's probably the most qualified

1 person in the world on this particular area. But whether  
2 this particular -- some of the cases I think that you'll  
3 see, Judge --

4 THE COURT: But, yeah.

5 MR. SOFER: -- puts in question when --

6 THE COURT: By qualifications, I mean does he  
7 have the ability by education, training, and experience to  
8 render the opinions that he's given. It's not whether this  
9 is sufficiently recognized and recognizable field of  
10 knowledge that the jury should be allowed to hear, which is  
11 different. That doesn't really involve hearing from him.

12 MR. SOFER: Understood, Judge.

13 MR. HARTMAN: I understand.

14 THE COURT: Okay. The next --

15 MR. SOFER: That's one out of three, Your Honor.

16 MR. HERDMAN: Judge, I've been selected to  
17 address Mr. Alterman, who's been proffered by the Amawi  
18 team. I think I can try to sum up the government's  
19 objection. I was going to go point by point in terms of  
20 the letter that was provided by counsel, but I think, in  
21 general, the government's objection relies on Rule 701 and  
22 the fact that expert testimony has to be proffered to  
23 explain -- help explain to the jury a fact that is at issue  
24 in the case. And as we go through this list of proffered  
25 testimony, areas of testimony from Mr. Alterman, I think

1 it's very clear there really is no fact at issue that  
2 Mr. Alterman would help to explain for the jury. In  
3 general, many of these items that he's been proffered for,  
4 I think, are already in evidence. They exist in the form  
5 of a consensual recordings, the statements of the  
6 defendants, and the government's witness. They also, just  
7 from video evidence -- and I have some specific examples I  
8 can point, Your Honor, to -- with respect to that.

9 THE COURT: Why don't you?

10 MR. HERDMAN: I would do that, Your Honor. It's  
11 probably easier said if I just walk through the letter  
12 here.

13 THE COURT: Okay.

14 MR. HERDMAN: With respect to the first area,  
15 it's -- it says a brief -- Mr. Alterman will provide a  
16 brief explanation of the geography of the Middle East.  
17 Well, we're happy to stipulate to a map, the Google Earth  
18 depiction that was provided to the jury. Anything like  
19 that, I think, would -- would take care of the geography  
20 aspect of this.

21 And then his proffer --

22 THE COURT: And there's also been testimony about  
23 the distance from whatever the town Mr. Amawi's family was  
24 in and the in and so forth.

25 MR. HERDMAN: And we'd be happy to stipulate to



1 anything such as that geopolitical dynamics between and  
2 among these countries.

3 THE COURT: Geopolitical dynamics between and  
4 among these countries, and again, I don't know what that  
5 means. I subscribe to Foreign Affairs, but I don't read  
6 it, quite candidly. I just leave it on my coffee table.  
7 So I don't really know what that means or what that would  
8 add in terms of any fact that's at issue.

9 MR. HERDMAN: As to number 2, the cultural norms  
10 of the Middle East, I think we have some strong  
11 reservations about the relevance of the cultural norms that  
12 are in play here. I don't -- I don't understand what the  
13 relevance of such testimony would be, perhaps counsel could  
14 explain that, at which point I would respond. But on its  
15 face, I don't see any relevance of any cultural norms in  
16 the Middle East with respect to this case.

17 And this sort of plays into number 3, which is an  
18 explanation of certain Arabic language conventions and  
19 norms. We do intend -- at least the government intends to  
20 call a narrative language expert that can testify to this.  
21 And I know that Mr. Amawi's team has qualified a linguist  
22 as well or translator, so it seems to me that that  
23 particular area would be covered elsewhere.

24 As to number 4 and really 5, the fifth paragraph,  
25 also -- I think I can discuss these two together, Your

1 Honor.

2 THE COURT: Let me ask Mr. Amawi's counsel, do  
3 you expect to have another expert talking about some of the  
4 linguistic issues?

5 MR. BRYAN: I'm not sure if it would be to the  
6 extent -- same extent, Your Honor. The only other language  
7 expert, obviously, is the translator, who also, obviously,  
8 because he's from the Middle East and --

9 THE COURT: Can address some of these?

10 MR. BRYAN: He could also testify to some of  
11 these same sort of cultural language things from people who  
12 are Middle Eastern and things of that nature. Mr. Alterman  
13 provides examples of a professor that he had at Harvard  
14 that was an atheist, but she was from the Middle East and  
15 she used the term *inshallah* all the time and other Arabic  
16 phrases, Arabic religious phrases, because it has more than  
17 just religious connotations, just like us saying, well,  
18 perhaps, maybe, or whatever.

19 THE COURT: Okay. So you have somebody else in  
20 the dug out, so to speak?

21 MR. BRYAN: Well, the primary purpose of  
22 Mr. Nash's testimony, which will be to provide translation  
23 of Arabic that occurred during some of these conversations.

24 THE COURT: Okay.

25 MR. BRYAN: Saying what was being said in Arabic.

1 THE COURT: But --

2 MR. BRYAN: I presume he could also talk about  
3 some of those just -- just with respect to *inshallah*. I  
4 think the government would concede, there's no particular  
5 religious significance to that saying, that particular  
6 word.

7 THE COURT: Whatever, but I'm just saying as to  
8 this particular subject, the defense does have somebody who  
9 appears -- and I would agree that appears to be born in  
10 that country and a sufficient translator, that I think  
11 would be able to testify. They've got somebody, as I say,  
12 in the dug out. They may not be on deck, they may not be  
13 penciled into the score card or the line up, but that's --  
14 okay?

15 MR. HERDMAN: I would suspect before we even got  
16 to the defense expert, the government language expert will  
17 testify to this exact notion. Obviously, it's not the  
18 exact same thing, but the evidence will be before the jury.

19 With respect to the historical Middle East  
20 attitudes towards the United States and this, then, spills  
21 over into paragraph number 5, which is a survey of public  
22 opinion in the Middle East. In general, I don't understand  
23 the relevance of these particular paragraphs. But I  
24 would -- I would say to The Court that with respect to  
25 there being some sort of a negative attitude in the Middle

1 East towards, specifically, U.S. military operations in  
2 Iraq, I think that's clearly in evidence in these  
3 consensual recordings that have been played for the jury,  
4 as well as videos that have been played and replayed by the  
5 defense and in cross-examination of Mr. Griffin. For  
6 instance, Your Honor, there is for -- that particular news  
7 clip from CNN that depicts a wounded Iraqi person laying on  
8 the ground who's then shot, presumably, by U.S. soldiers or  
9 Marines, and then there's a discussion in that same  
10 consensual recording between Mr. Amawi and Mr. Griffin  
11 regarding some of these U.S. military operations. And in  
12 fact, this theme runs throughout all of the consensual  
13 recordings.

14 THE COURT: I understand. I tend to agree with  
15 you. I'm not sure what history adds to that.

16 MR. HERDMAN: And if we talk about paragraph 6  
17 and 7 together as well, this is a wide-spread prevalence  
18 among those in the Middle East of serious doubts that  
19 Muslim Arabs were responsible for the attacks in 9-11, as  
20 well as a brief explanation, Muslim Arab attitudes towards  
21 Osama bin Laden. Again, Your Honor, both of these  
22 paragraphs have been discussed in both consensual  
23 recordings that is Mr. Amawi offering opinions or thoughts  
24 about his own -- his own beliefs as to what -- whether bin  
25 Laden acted properly on 9-11 or what actually occurred on

1 9-11.

2 And again, there were three videos, I think, that  
3 were replayed for the jury on -- oh -- I'm losing track of  
4 time now -- I think it was Wednesday when Mr. Ivy was  
5 cross-examining Mr. Griffin, that relate to this theory  
6 that that is a conspiracy related to September 11th. And  
7 there's one particular gentleman, English-speaking  
8 gentleman who stars in all these videos. The notion that  
9 there's some debate amongst Arabs or Muslims as to who was  
10 responsible for September 11th, and there may be some  
11 conflicting notion of whether or not Osama bin Laden was  
12 responsible, whether or not he acted properly, all that  
13 evidence is also before this jury. And it's -- and before  
14 this jury in the words of the defendant himself.

15 THE COURT: Okay.

16 MR. HERDMAN: The next paragraph, number 8, Your  
17 Honor, I think so, is probably in terms of the veracity of  
18 this evidence. I think paragraph number 8 is the most  
19 problematic and here's why: What this paragraph proposes  
20 is that there are foreign fighters who have gone into Iraq  
21 to support the Iraqi insurgency. Of those 5,000 or so  
22 foreign fighters that have gone into Iraq, only a small  
23 percentage of those fighters are from Jordan. Now, this --  
24 just imagine, Your Honor, if the government was proffering  
25 expert testimony to say that there are 5,000 foreign

1 fighters that have gone into Iraq and every single one of  
2 them is a Jordanian. The inference that we would be  
3 drawing for this jury is completely improper in that  
4 instance, which is that Mr. Amawi must have been someone  
5 who was interested in joining the insurgency in Iraq  
6 because other Jordanians make up the bulk of the insurgency  
7 in Iraq. And I think it is completely improper when the  
8 defense offers it for the opposite inference, which is to  
9 say Mr. Amawi couldn't have been wanting to support the  
10 insurgency in Iraq because --

11 THE COURT: I understand the logic. Okay.

12 MR. HERDMAN: And the remainder of this letter,  
13 Your Honor, deals with this notion of new media. And some  
14 of it talks about Arabic-language satellite television.

15 THE COURT: I don't know. I'll hear from  
16 Mr. Rich, I'm sure, but this segment seems to me  
17 anticipatory in response to Mr. Kohlmann.

18 MR. HERDMAN: And that's quite possible, Your  
19 Honor. I would just say for The Court -- that as far as  
20 I'm aware -- there's no evidence of any Arabic-language  
21 satellite television in this case. That is to say,  
22 Mr. Amawi and Mr. Griffin, Mr. El-Hindi and Mr. Griffin,  
23 Mr. Masloun and Mr. Griffin, they didn't sit down and watch  
24 Arabic-language satellite television as they did some of  
25 these videos that were released on the Internet. And most

1 of the news media -- and Mr. Alterman, I would submit, is  
2 qualified to discuss this, Your Honor -- deals specifically  
3 with this notion of satellite television, but he's not a  
4 real expert when it comes to the Jihadist use of the  
5 Internet. The areas that he's written on, by and large,  
6 can be referred to -- he talks about it in terms of the  
7 "new media," but it's really old media. It's television  
8 and it's not so much focused on the Internet. And we would  
9 have some reservations about his qualifications to discuss  
10 new media in the sense that it involves the Internet.

11 THE COURT: Okay.

12 MR. BRYAN: First of all, as it relates to  
13 Mr. Alterman, I don't think -- I don't believe it's  
14 necessary to discuss his qualifications as they are very  
15 well laid out in -- I -- and I'm not sure that his  
16 qualifications are in dispute. Maybe they dispute whether  
17 or not his area of expertise would cover some of the areas  
18 of his testimony, but his qualifications are --

19 THE COURT: I would tend to agree. I don't think  
20 that's the focus of the objection.

21 MR. BRYAN: And as it relates to experience to  
22 relate to these things, Mr. Alterman has traveled  
23 extensively to the Middle East. He's a fluent Arabic  
24 speaker and learned in Egypt for a -- he's in and out of  
25 the Middle East on a regular basis, including Iraq and

1 Jordan and Syria, including all of the countries of the  
2 Middle East. So as far as his familiarity with the Middle  
3 Eastern culture, not only familiarity with it, but  
4 experience of the Middle Eastern culture, it's vast and  
5 wide.

6 But as it relates to the specific areas of  
7 testimony that we want to elicit from Mr. Alterman, we  
8 agree that any globe or map or map or Google Earth, or  
9 whatever, can establish the basic geography of the area,  
10 but it's also -- I think it's important when we talk about  
11 geopolitical dynamics among these countries, quite frankly,  
12 I don't think -- it's amazing to me, quite frankly, that I  
13 learned through Mr. Amawi, his knowledge of his own region  
14 as compared to what basic Americans is of what's going on  
15 in the Middle East as far as following only the history and  
16 politics and the conflicts, and how they arose, and when  
17 they arose, and how that becomes ingrained in just about  
18 everybody who lives in the Middle East.

19 Even Mr. Griffin testified to yesterday, in  
20 response to a question from Mr. Doughten, that -- that  
21 Arabic men or people from the Middle East, they love to  
22 discuss politics. Well, they love to discuss politics,  
23 quite frankly, because they're not -- in the cradle of  
24 political discussion. Everything that seems to be  
25 happening in the world today is as a result of what's been



1 happening in the Middle East for the past, you know, two  
2 thousand years. But these conflicts are paramount in our  
3 client's minds, especially in Mr. Amawi's mind. He's a  
4 great student of, not only history, but of religion and  
5 conflicts and how they occur.

6 And so I think what Mr. -- Mr. Alterman is able  
7 to provide -- and just to back up a little bit about what  
8 Mr. Herdman said about the Rule 702, quite frankly, that  
9 test is fairly simple. Expert testimony is permissible  
10 where it can help the jurors understand the evidence or  
11 determine a factual issue. And it applies both in this --  
12 in -- both rationales behind expert testimony apply in this  
13 case.

14 The government has played a tremendous amount of  
15 evidence, and it's being replayed on cross-examination,  
16 conversations between and among our clients concerning  
17 Middle Eastern affairs, and concerns about what's going on  
18 in their homelands and where they're from and things of  
19 that nature. Based upon that -- and I also believe, based  
20 upon the government's interpretation of these  
21 conversations -- they're going to argue to the jury that  
22 these defendants have certain motivations to assist in the  
23 Iraqi insurgency or to provide material support or to kill  
24 or maim American citizens abroad, as it relates -- again,  
25 just -- what I'm talking about now is more general and less

1 specific -- but as it relates to -- to the general  
2 argument, as it relates to the evidence, as being able to  
3 assist the jury in issues and fact.

4           This is the critical nature of that expert  
5 testimony in this respect because they -- they play all of  
6 this. And I'm sure they're going to get up this closing  
7 argument, and they're going to recount everything that our  
8 client said, everything that they said about Osama bin  
9 Laden, they're going to remind the jury who Osama bin Laden  
10 is. According to the government, Osama bin Laden is this  
11 guy who attacked us on 9-11. Mr. Amawi's heard expressing  
12 admiration for Osama bin Laden, that he must be Osama bin  
13 Laden or be like Osama bin Laden. If he wants to be like  
14 Osama bin Laden, that he wants to kill American soldiers  
15 abroad, that he's that close to following through with his  
16 belief system or his -- maybe even his heartfelt desires,  
17 but -- but of proving intent for the government, they based  
18 upon all this conversation proving intent is literally an  
19 inch away.

20           When you understand the culture, you understand  
21 the Middle East and you understand --

22           THE COURT: None of that's a defense. I mean,  
23 the fact that somebody has a particular world view and acts  
24 on the basis of that world view is neither an element of an  
25 offense defense or defense, and I have a real problem with

1 the relevancy of any of this, because to the extent that  
2 it's offered is -- as it seems to being offered as an  
3 explanation of how one might view events, literally view  
4 events, by meaning of video, and how one might interpret  
5 not just the videos, but the -- the conflict in Iraq and  
6 the whole rise of various anti-American, anti-western  
7 groups, or ideologies. It's no more a defense than in the  
8 charge were having gone into a bank and robbing an armored  
9 truck to raise money to support a particular group -- which  
10 obviously isn't here, I take that only as an example.

11 And it seems to me it's no more a defense and no  
12 more admissible than it would be in a case against La Cosa  
13 Nostra, the Mafia, to say the defendant grew up in a  
14 Sicilian setting with the certain code of honor where  
15 everybody walked around with the parage and shot guns and  
16 where revenge was the highest form of manhood and omata,  
17 O-M-A-T-A, is a requisite, so forth and so on. And that  
18 certainly would never be allowed in a prosecution of  
19 somebody with having committed a RICO violation. I have a  
20 real problem with that.

21 MR. BRYAN: Your Honor, I understand completely.  
22 We're not offering this testimony as a justification  
23 defense. We deny --

24 THE COURT: What else do you have?

25 MR. BRYAN: We deny that our clients had the

1 intent to commit the offense which the government has  
2 accused them of committing. The government is going to use  
3 their words against them. In fact, Mr. Getz said in  
4 opening statements these men will be convicted by their  
5 words. If there's an alternate explanation for these mens'  
6 words that is consistent with innocent and inconsistent  
7 with the intent to commit the crime --

8 THE COURT: I think Mr. Getz is -- excuse me,  
9 Mr. Sofer.

10 The point he made earlier is, I don't think that  
11 that explanation can come in this instance from a third  
12 party, because the jury -- let's say this comes in, folks,  
13 ladies and gentlemen, people who grow up in the Middle East  
14 or who's families have recently come, have immigrated from  
15 the Middle East, do so in view with the cultural mindset  
16 that is common place throughout the Middle East in a  
17 society and the circumstances within which they were  
18 reared. The inference that is sought to be drawn, then, by  
19 the jury -- the jury is being encouraged, and therefore,  
20 ladies and gentlemen, there was no intent to do those  
21 things that the government alleges these defendants  
22 intended to do.

23 Well, I'm not -- I don't see where that  
24 testimony -- that expert did make a nexus of the mindset of  
25 a defendant with regard to the acts attributed to the

1 defendant. And I really don't. That's the problem that I  
2 have. And it does seem to me that one looks elsewhere in  
3 the evidence, which is so far, I think, fairly extensive, I  
4 mean, it's -- it's clear quite, candidly -- I think it  
5 seems to me, I think it would be clear to the jury that  
6 Mr. Amawi has some very fundamentally held and felt  
7 religious views. His religion has played a very active  
8 role in his life. And the jury knows that. And whether he  
9 testifies or not, seems to me, okay -- the evidence about  
10 what was on his mind when he was saying and doing the  
11 things that the government claims, is proof of an intent to  
12 provide material support and to conspire, to agree with  
13 others to provide material support to the terrorist --  
14 terrorism and conspire to kill and maim American soldiers.

15 I think there's a large distance between having  
16 views that favor the insurgency, which are opposed to what  
17 is going on in Iraq, and to conspiring to actively  
18 participate in those views. And the evidence is what the  
19 evidence is. And have somebody come in and say, look, this  
20 is the way it is in the Middle East, this is how one's  
21 ideology and world view are formed, and this is the effect  
22 of that world view and instinct and foreign impulse to  
23 engage in political discourse in a very broad and extensive  
24 way, I don't see the relevancy of that. I'm just letting  
25 you know how I'm responding to what you're saying.

1           MR. BRYAN: I understand. I understand Your  
2 Honor's thought process on this topic. Respectfully, Your  
3 Honor, I disagree with the thought process, and please give  
4 me time to explain my position.

5           The government's entire case against these  
6 defendants, especially Mr. Amawi, are the words that he  
7 spoke. They -- they, of course --

8           THE COURT: It comes in going out shooting and  
9 all that stuff, too, but I understand what you're saying.  
10 If the words are viewed in one way, wins; if they're viewed  
11 in another way the defendant wins.

12           What occurred during the conversations, in light  
13 of the actions, is found by the jury to manifest an intent  
14 to do the -- to commit the acts that are done in  
15 anticipation of doing other acts, the government makes --  
16 the jury finds that beyond a reasonable doubt one or more  
17 of the defendants will be found guilty; not beyond a  
18 reasonable doubt, they won't. I'm sure that's why we're  
19 hearing all conversations.

20           MR. BRYAN: Understood, Your Honor. And quite  
21 frankly, if it was evidence of acts in furtherance of the  
22 conspiracy, there may not even be a trial. There would be  
23 no reason for a trial. So this case is going to be based  
24 upon this man's -- his guilt or innocence in this case is  
25 going to be determined, in large measure, by the words that

1 he spoke to Mr. Griffin. And part of the defense may be  
2 that he didn't even intend the words that he spoke to  
3 Mr. Griffin because of the considerable evidence that  
4 Mr. Griffin, at least towards the end of this case, seems  
5 to have been played by it in large measure. That may be  
6 part of the defense.

7 But -- but also part of the defense is something  
8 that we will argue to the jury, but I think we are entitled  
9 to the assistance of the expert, in fact, I think the  
10 jury's entitled to the assistance of the expert is to be  
11 able to understand why somebody in Mr. Amawi's position,  
12 from where in the world he comes, would have the belief  
13 systems that he has and would say the things that he says.

14 Now, in our country you're permitted to have any  
15 belief system that you want. You're permitted to believe  
16 in Satan, the most evil of all evils, you're permitted to  
17 worship him in this country. You're permitted to worship  
18 Hitler. You're permitted to read Hitler's writings.  
19 You're permitted to argue and have political discourse that  
20 Hitler was right, and we should all live under a Nazi  
21 regime. You're permit to argue all of those things, but  
22 that doesn't make you a guilty of that crime because of  
23 that belief system. But if there was evidence that someone  
24 had those belief systems were -- were planning to attack a  
25 synagogue, and there was evidence that there was a plan in

1 place to attack a synagogue, or whatever, then of course  
2 the government would be able to present its evidence.

3           Each person's belief system to show what their  
4 motive is, to show that they did have an intent to go  
5 forward with the commission of the crime. There's a  
6 difference between having a belief system and having the  
7 intent to go forward with the crime. And I think it's  
8 important to point out to the jury that Mr. Amawi's belief  
9 system is not that out of the norm for people who come from  
10 the part of the world that he comes from, as it relates  
11 specifically to the Iraqi war and opposition to American  
12 troops there, even a belief that the insurgency groups are  
13 justified in fighting back and killing American soldiers.  
14 There's nothing illegal or inappropriate about that belief  
15 system.

16           What the government wants to do is take that  
17 belief system, try to present some evidence that there was  
18 some kind of plan to go forward, and to deprive this man of  
19 his liberty, in essence, in large measure, because of that  
20 belief system and not necessarily going to a gun range.  
21 The ambiguity about why someone may go to a gun range is  
22 also a defense to us, but we also should have an  
23 opportunity to explain this belief system, quite frankly,  
24 Your Honor, which is foreign to people in America. It's, I  
25 think, less so now because of the time that has passed



1 since this case was being investigated to the present time  
2 in 2008. I mean, American opinion -- and I would  
3 acknowledge has -- as -- has -- has evolved over time to be  
4 predominately against the Iraq War, not necessarily for the  
5 same reasons that Mr. Amawi's against the Iraq War, but  
6 because of the policies, that the American soldiers have --

7 THE COURT: Let me also say, if I may, in terms  
8 of how someone might come to view what our government and  
9 our military is doing in Iraq negatively, I feel very  
10 strongly about that, how that can occur. I think that  
11 clear evidence of that in the case, you see American  
12 soldiers shooting somebody lying on the ground, American  
13 soldiers engaging, could be argued, at least speaking in  
14 the abstract, as target practice, people around trucks, the  
15 crusader video and so forth -- that and there may be other  
16 examples that are slipping my mind -- but there are things  
17 that this jury has seen, I think, that are shocking to its  
18 sensibilities as American citizens about what fellow  
19 Americans are doing. And so to argue, ladies and  
20 gentlemen, some of the things that you are arguing, I  
21 think -- basis of this court.

22 I don't think it's necessary to bring in somebody  
23 from -- who is an expert in the history, and also spills  
24 over into the other proffered expert as to both of the  
25 geopolitical and historical events, both past and

1 current -- past, recent, and current, or in terms of the  
2 religion. And I think that the recordings give an insight  
3 into Mr. Amawi's world and religious views that I don't  
4 think this jury would view as entirely unsympathetic.

5 The evidentiary basis to the arguments that you  
6 want to make is being developed -- I'm sure will be  
7 developed more extensively by yourselves.

8 And ultimately, I think Mr. Sofer's point is  
9 well-taken, and that is, where we find out what was on a  
10 person's mind and what a person intended is in the evidence  
11 that we have. You don't look to experts to come in and  
12 tell somebody what was on a person's mind, either directly  
13 or indirectly, unless there's an insanity defense or  
14 something of that sort, which isn't part of this case. We  
15 look to the words and actions and conduct that are in the  
16 evidence. And we draw the inference from those to  
17 determine whether or not they add up to the intent, and  
18 it's up to the jury to make that determination.

19 And at some point a defendant has to make a  
20 determination to take the stand and explain himself to the  
21 jury or not. And if he does not, I can assure you I will  
22 make a -- I will give a vigorous instruction of the jury  
23 that there's no inference at all. I feel very strongly  
24 about the necessity of making clear to jurors -- I think we  
25 already did during voir dire -- of upholding and respecting

1 fundamental constitutional rights.

2 And I just don't -- I don't see the linkage  
3 between -- the nexus between -- like with Mr. Shy, the  
4 nexus between these general propositions and its relevance,  
5 what they have to say, the relevance of what they have to  
6 say in this particular case. And the nexus and the linkage  
7 to Mr. Amawi, in this instance, and Mr. El-Hindi in the  
8 other.

9 But go ahead. I really want you to know exactly  
10 where I am so that you can address these and say, Judge,  
11 you're wrong on this and this issue.

12 MR. BRYAN: I understand, Judge. I understand.

13 Your Honor, I understand that I have arguments  
14 available to me that -- we're obviously trying to present  
15 some evidence in a way to try to explain why our client may  
16 say things that he said at certain times throughout the  
17 audio recordings in this case.

18 The government is permitted to draw every  
19 negative inference from the things that our client said  
20 that the jury may seem to be offensive. They're able to  
21 draw every negative inference that exists known to man, and  
22 I don't need to remind the judge that we're sitting in a  
23 courtroom in the United States of America and not in the  
24 Middle East and that the jury that is sitting in judgment  
25 of my client, notwithstanding The Court's extensive

1 inference to draw upon the widest pool of jurors possible,  
2 does it have within the final jurors who are here in this  
3 case a person of Arabic descent or even Muslim descent.  
4 And quite frankly, that is a little bit troubling to me,  
5 because we're -- we're in the Toledo, Ohio area, in  
6 southern Michigan area, where there is a large population  
7 of people from the Middle East and people who practice the  
8 Muslim faith. So, in essence, my client is being judged by  
9 American, predominately Christians, whether they're  
10 nominal, some of them, if I recall from their  
11 questionnaires.

12 THE COURT: Some are very devout.

13 MR. BRYAN: Some of them are more devout.

14 And he's clearly a devout Muslim, as evidenced by  
15 the tapes played here. And I think there could be some  
16 misunderstanding about some of the things that he says that  
17 we're not permitted to call an expert to provide  
18 alternative explanations for why some people may say what  
19 they're saying.

20 THE COURT: The point is, I don't think that they  
21 can -- that the lingo -- that maybe so, but the general  
22 population, you're talking about an individual, and the  
23 expert is not able to say -- to draw, I think, that  
24 reasonable degree of certainty that because of that,  
25 therefore this. As for this individual, you just can't. I

1 just don't -- you have --

2           If I recall correctly, Mr. Amawi's father was in  
3 the Jordanian military. Well, a person who's in the  
4 military, seems to me it's fair to say, might have  
5 different views that were contrary to those of the society  
6 on who's behalf he is in commission to act. And we don't  
7 know -- and that fact of itself, does that mean that the  
8 setting in which Mr. Amawi was raised, was reared, and the  
9 influences that he got in the cradle and the nursery and at  
10 the supper table, what were they? Were they in line with  
11 the common perception?

12           We also have in evidence, it seems to me, that  
13 there was, perhaps at work, perhaps because -- not because  
14 of the history, but because of the current and recent  
15 events -- and these were very loosely, quote, a conversion  
16 that his family viewed as something that happened to  
17 radicalize and to call forth certain views and attitudes  
18 that were, at least the concern to them, contrary to what  
19 they had -- so when we get into this whole very tangled web  
20 that only gets us, for the jury, very far at all because of  
21 the -- there's no proof that whatever these cultural,  
22 historical, political, religious circumstances were -- even  
23 assuming that they are sufficiently widespread that we  
24 could draw an inference that they may have had an impact in  
25 this case -- where is the connection that they did have an

1 impact on this individual?

2 MR. BRYAN: There's a couple things that I need  
3 to respond to, Your Honor. The first thing that you said  
4 at the beginning was that you feel that's appropriate for  
5 an expert to sort of individualize Mr. Amawi based upon  
6 what other people in his part of the world think and  
7 believe and things of that nature. We're not calling the  
8 expert for that purpose. He will not even comment on  
9 Mr. Amawi's behavior in this case. He will not even be --  
10 he has not even been provided --

11 THE COURT: But I think what's going on, you  
12 want -- you want -- the reason you want the expert is that  
13 the jury can infer that he was influenced in this way and  
14 that helped to explain the views to the jury as expressed  
15 and -- and -- and the significance of the things that he  
16 said. And I don't think that inference, fairly, can be  
17 drawn. And in that sense of it, maybe -- he's sure he's  
18 not going to testify, and by the way, he had these views,  
19 but the inference that you want the jury to draw is that  
20 that's what motivated him, that's what was on his mind.  
21 And I just don't think that that inference is a proper  
22 inference to propose to the jury on this kind of evidence.

23 MR. BRYAN: It's an inference being offered to  
24 rebut the government's inference that all the things that  
25 Mr. Amawi is saying means that he intends to go forward

1 with a conspiracy to aide others in killing American  
2 soldiers in Iraq. I mean, obviously, that's the inference  
3 they want drawn from Mr. Amawi's speech, the things that he  
4 said. There's an alternate explanation for the things that  
5 Mr. Amawi said, and even Your Honor touched upon --

6 Just strike what I just said because it's the  
7 second point I wanted to make about -- the last thing that  
8 Your Honor said, I think, explains the need for an expert  
9 in this area.

10 You talked about some evidence that's already  
11 been presented, that Mr. Amawi's family did, you know --  
12 had some problems with him and through Mr. Griffin, the  
13 credibility, the extent of that claim, and that Mr. Amawi  
14 was having problems with his family because they viewed him  
15 as growing more radical, and they feared for his safety,  
16 and they wanted him to get out and things of that nature.  
17 But that's the evidence that's been presented.

18 The government, I'm quite sure, in closing  
19 argument may even make some sort of argument about the  
20 radical sayings of Mohammed Amawi, that Darren Griffin  
21 faked the radicalization of Darren Griffin, but in doing  
22 so, he was able to uncover the true radicalization of  
23 Mohammed Amawi.

24 What this expert will do, Your Honor, is sort of  
25 demystify that government argument, allow us to respond to

1 that government argument in words beyond just what I would  
2 argue to the jury, and he on -- in evidentiary expert  
3 evidence that would support my arguments.

4 I believe that Mr. Amawi's entitled to that  
5 defense, that his belief system is not that far different  
6 than everybody else who's in the Middle East, as it related  
7 to Mr. -- Mr. Alterman's research -- that at the time of  
8 the Iraqi war, 80 percent of people living in Jordan -- the  
9 country that Mr. Amawi lived in -- believed that the  
10 terrorists in Iraq were the United States government -- was  
11 the United States government. And that the insurgents were  
12 actually the good guys, they were the freedom fighters,  
13 they were the ones fighting back under, you know, a  
14 defense-of-Islam theory.

15 And that's -- that's the -- he was a young man at  
16 the time during -- during the invasion of Iraq. And it's  
17 also commonplace that these are the -- this is more through  
18 our other experts and that's why we sort of needed two  
19 experts in this area, and I don't want to jump ahead to  
20 Mr. Aslom (phonetic), but they do somewhat compliment --

21 THE COURT: They do, left hands I think of the  
22 same --

23 MR. BRYAN: But it allows us to provide an  
24 explanation to some things that Mr. Amawi said that's Al --  
25 it doesn't -- it's the correct explanation. It means it's



1 an alternative -- it's an alternative explanation for the  
2 things that Mr. Amawi expresses on the videotape.

3 The jury -- the government just wants the jury to  
4 believe that only, in effect, common sense to the jury,  
5 people who say these things really mean what they say.  
6 They said what they meant, they meant what they say, you  
7 know.

8 I can predict, quite frankly, 90 percent of what  
9 the government's closing argument is going to be in this  
10 case because of that. I don't think that makes me a wise  
11 man. It just makes me a competent lawyer.

12 But because of that, we're attempting to be able  
13 to explain some -- some, admittedly, very serious and  
14 troubling things that were just spoken about our client,  
15 and we have alternate avenues in which to try to explain  
16 what he said to the jury, but I don't believe that we  
17 should be denied this avenue to be able to explain it as  
18 well.

19 Perhaps maybe Mr. Amawi, you know, could -- and  
20 I'm not -- I'm not predicting he could, as Your Honor  
21 suggests, take the stand and explain his motivations.

22 THE COURT: I don't mean to say --

23 MR. BRYAN: Even if he did, I think he would be  
24 entitled to the support of an expert from the region -- not  
25 from the region, but an expert on the region from which he

1 comes, to explain that Mr. Amawi has a belief system --  
2 isn't so -- so out of the norm in the Middle East. And  
3 that, quite frankly, if the belief system in the Middle  
4 East, objecting to American policies in the Middle East and  
5 believing that the Iraq War's wrong and believing that  
6 certain types of Jihad are permissible or are allowed --  
7 that was not -- again, I'm not saying this is a  
8 justification of that, because what we would submit to the  
9 jury is that clearly our client was rooting for the  
10 insurgents, but rooting for the insurgency is not the same  
11 as is becoming part of a conspiracy to join the insurgency.

12 But be that as it may, the expert opinion will  
13 allow us to sort of demystify Mr. Amawi. And if the  
14 government fears that people who speak like Mr. Amawi are a  
15 threat to this country, then we're in huge amount of  
16 trouble in this country because there's probably  
17 100 million Muslims in the Middle East who think and say  
18 the same things there that Mr. Amawi says.

19 Now, I don't believe that Mr. Amawi's a threat to  
20 the world, and I don't believe 100 million Muslims in the  
21 Middle East who think and say these things are a threat to  
22 the world as well. Because I think what Mr. Alterman will  
23 say is that a fraction, a disproportionately small amount  
24 of people who think this way will actually engage in that  
25 activity, and it's done for many reasons.

1           And the activity that I'm talking about is  
2       terroristic activity. And the reason it's done for many  
3       reasons, quite frankly, is just survival.

4           People who live in a comfortable environment are  
5       less likely to go and join an insurgency or less likely to  
6       become a suicide bomber than someone who grows up in the  
7       slums of Saudi Arabia where the vast majority of foreign  
8       fighters that come from the Middle East -- which is what  
9       Mr. Alterman can testify about -- and they're recruited  
10      directly right out of the slums. They come from the slums  
11      of Saudi Arabia because of the deplorable living conditions  
12      that they have and the insurgent leaders say and the  
13      terrorist leaders -- I don't want to lay the law on  
14      insurgent terrorists, but the -- they target these people  
15      who are vulnerable.

16           The evidence in this case is that Mr. Amawi had  
17      a more comfortable lifestyle in Jordan than he had in the  
18      United States, and quite frankly, that's probably the  
19      evidence why he wanted to get -- come to Jordan because he  
20      couldn't pay his rent in the United States, but he lived in  
21      a six-story villa in Jordan.

22           So this sort of philosophical -- and I'm sort of  
23      bleeding over, I think, into what Mr. Aslam's going to  
24      provide, it provides an explanation for my client. It  
25      allows us to defend our client by explaining it in a way

1 that's consistent with Islam and inconsistent with the  
2 government's idea of guilt. It's not saying whether  
3 depriving the government of their opportunity to argue  
4 their inferences -- obviously, they're going to be free to  
5 argue every negative inference they can from the things  
6 that Mr. Amawi said and from the beliefs that he held, and  
7 in certain respects, this is a double-edged sword.

8 But not in certain respects, but in all respects,  
9 this testimony provided by our own expert is a double-edged  
10 sword, that the evidence in the case, unfortunately, is a  
11 sword that's much sharper on the government's side than it  
12 is on our side, because the jurors can draw all the  
13 negative inferences.

14 And unless they're equipped with the knowledge of  
15 the thought processes of the people who live in the Middle  
16 East and the concerns about American imperialism and,  
17 perhaps, themselves of one day becoming the victim of an  
18 invasion into their own country or situation into their own  
19 country becomes occupied by the United States -- Mr. Amawi  
20 lives 45 minutes from the Iraqi border, 20 minutes from the  
21 Syrian border. This is in his backyard. I don't see why  
22 we shouldn't be able to explain that to the jury. I don't  
23 want to move -- I don't want to --

24 MR. HERDMAN: Your Honor, I have to respond.

25 THE COURT: Let me -- if you can complete with

1 regard to Mr. Alterman, and I'll hear from Mr. Herdman. I  
2 think there's another point.

3 MR. BRYAN: I argued much more generally. The  
4 only thing I really didn't argue or address, I addressed  
5 sort of American -- or measurable public opinion in the  
6 Middle East, but as it relates to media -- and I admit and  
7 acknowledge that there's no evidence of viewing satellite  
8 television or whatever -- what -- what Professor Alterman  
9 is testifying about or what he would be testifying about is  
10 how news media in the Middle East is a relatively recent  
11 phenomenon beginning with the widespread use of satellite  
12 television because of these countries -- because of the  
13 regimes in these countries were oppressive, and they didn't  
14 have free use of -- they didn't have -- especially in Saudi  
15 Arabia, they had government-controlled media. And because  
16 of the government-controlled media, people in the Middle  
17 East were pretty much starved for news from around the  
18 world, not only news from around the world, but news in  
19 their own backyard, what was really happening in their own  
20 backyard.

21 But with the advent of satellite television and  
22 satellites, and because of the economy in the Middle East,  
23 it -- the satellite dish in the Middle East is relatively  
24 inexpensive compared to a satellite dishes in the United  
25 States, and they don't have service companies either where

1 once you get a satellite dish in the Middle East -- and  
2 Mr. Alterman will explain this -- you basically have free  
3 television from around the world. You pay for the  
4 satellite -- it would be great to have in the United  
5 States -- but once you put it up, you can -- you have free  
6 television from around the world, so that for the first  
7 time the satellites came in, people were able to see the  
8 BBC, they were able to see CNN, a lot of information that  
9 they got was from the objective reporting from American  
10 news outlets.

11           Some people would accuse all American media of  
12 having a liberal bias in this country, and quite frankly,  
13 that liberal bias was reached -- was able to be reached in  
14 the Middle East, and people would see that. And not even  
15 American media, but just like CNN or MSNBC or things like  
16 that, that people were able to see that they were  
17 sympathetic to the plight in the Middle East or the Arabs  
18 in the Middle East, the Palestinian -- what was happening  
19 in Israel and Iraq and all these other places.

20           So that -- that's important, and that's an  
21 evolution, and that evolution led to not just satellite  
22 television, but the Arab world getting their own CNN, so to  
23 speak, which was Al Jazeera television, which came up in  
24 the '90s around the time of the first Gulf War, and it just  
25 basically exploded. And these people, who for centuries,

1 their thirst for knowledge and desire to learn about what  
2 was happening in their own world had been suppressed, they  
3 just latched onto this -- this new media, this way to  
4 obtain information. The evolution continued, quite  
5 frankly, Your Honor, into, you know, the year 2000.

6 THE COURT: What -- what relationship does that  
7 have to this case?

8 MR. BRYAN: That's what I'm getting to. The  
9 evolution basically transformed this media, this  
10 information gathering society. Then in the -- in, you  
11 know, the turn of the century in the year 2000, that's when  
12 the Internet began to become prevalent, and especially  
13 throughout the first half of the first decade of this  
14 century. The Internet explosion occurred and that's when  
15 these videos started developing in the Middle East and the  
16 Jihadi videos, specifically. Again, it's admittedly  
17 propaganda put out by American -- so to speak, but this  
18 created a situation in the Middle East where these  
19 especially young people who were good at using --

20 THE COURT: What does that have to -- what with  
21 this case, how -- I don't see any connection.

22 MR. BRYAN: Well, this case, Your Honor, the  
23 government's -- the vast majority of the case presented  
24 against Mr. Amawi thus far has been the conversations  
25 between him and Mr. Griffin, but the conversations between

1 him and Mr. Griffin while they're viewing -- while they're  
2 viewing videos off the Internet. 99 percent of those  
3 videos off the internet, including CNN, Al Jazeera, and  
4 admittedly, from insurgent groups, and even Al-Qaeda itself  
5 and Osama bin Laden propaganda that's been poured onto the  
6 Internet by all these different groups.

7           The evidence is clear that Mr. Amawi was a  
8 connoisseur of that, that he was collecting all this  
9 information. I think his computer records will reflect  
10 that he collected information from everywhere, which -- not  
11 to mention which was a great selection of photographs of  
12 American fighter planes -- the best that I've ever seen --  
13 and so many different photos of fighter planes and the  
14 like. Just --

15           He just has a thirst for knowledge and  
16 information, but that's not unique to Mr. Amawi in the  
17 Middle East. In the Middle East everybody who has access  
18 to the Internet downloads videos. They come in large  
19 volumes, they share videos with each other. Everybody  
20 knows the videos. Everybody knows the symbols, the  
21 Al-Qaeda symbols.

22           THE COURT: I have no problem with even the basis  
23 for that kind of opinion, even if you were to slice and  
24 dice it down to young men in their 20s, there's no  
25 scientific and legitimate way that that kind of proposition



1 can be inserted, I don't think. And again, the more this  
2 gets projected, the further that it gets from this case.  
3 And the evidence in this case and the utility of any expert  
4 opinion, even better found in the grounded in this case.

5 MR. BRYAN: Your Honor, I would respectfully  
6 suggest that it actually gets to the heart of this case.  
7 Because this isn't a case where Mr. Amawi and Mr. Masloun  
8 and Mr. El-Hindi were meeting in secrecy and planning how  
9 they were going to provide material support, how they were,  
10 you know, going to collect as many ball bearings as they  
11 could collect, as many, you know, materials for bomb vest,  
12 collect -- collect even money to -- to send to the Middle  
13 East. I mean, that -- this case involves for the most part  
14 Mr. Amawi and Mr. Griffin viewing videos. A thing that is  
15 extremely common, according to our expert, in the Middle  
16 East, a behavior that is extremely common amongst young  
17 Arab -- young Arab men in the Middle East. And it's sort  
18 of a sense of empowerment because they can't watch the  
19 news, especially in the Middle East because the --

20 THE COURT: But again, that -- what was watched  
21 in this case is the evidence, not what, I mean, really,  
22 we -- there's no way of knowing whether anybody else  
23 watched that video. We can sort of speculate, but I just  
24 don't see how that has any connection with anything in this  
25 case.

1           MR. BRYAN: Again, Your Honor, I anticipate in  
2 the government's use of this evidence, and perhaps their  
3 arguments into this evidence, their -- in fact the  
4 testimony of Mr. Griffin, himself, which in my own mind,  
5 seems somewhat absurd that he was describing a lot of these  
6 videos as training videos.

7           THE COURT: Which is an arguments you can make.

8           MR. BRYAN: It is an argument that I have, but  
9 I'm sure that the government's going to argue that  
10 Mr. Amawi's interest in this subject matter is rooting for  
11 the participants in these videos. His -- his expressed  
12 admiration for Osama bin Laden, so to speak, goes to his  
13 intent to join this conspiracy. And if we have an  
14 alternative explanation, that this isn't uncommon, and  
15 he -- again, we would suggest that the government needs to  
16 be --

17           THE COURT: Again, how can there be evidence of  
18 how somebody else, much less how on a national or even  
19 regional basis, how people would view that and how they  
20 might respond? I don't see the relevance.

21           MR. BRYAN: Not how they might respond, Your  
22 Honor. That's the province of the jury. But the actual  
23 viewing of these -- these videos, that there is an innocent  
24 explanation or one that's not consistent. But it's  
25 inconsistent with innocent, and it's cultural, but also

1 there as well in this respect addresses the -- the video  
2 element as well. It is cultural. It's cultural in the  
3 Middle East for people to collect and to view Jihadi  
4 videos. Now some of this, quite frankly, admittedly so,  
5 was in response to the proffered testimony of Mr. Kohlmann  
6 who was prepared to testify that the viewing of these  
7 videos shows not only a sympathy, but --

8 THE COURT: Sure the largest collection in the  
9 Continental United States except for his.

10 MR. BRYAN: Shows short of a mobilization towards  
11 no goal, or whatever. Clearly, if Mr. Kohlmann would be  
12 permitted to come in and testify to this, we believe we  
13 should be able to call experts and show, no, this is not  
14 the case in the Middle East for the most part.

15 But again, I don't want to -- I don't want to get  
16 into Mr. Kohlmann, because I think he's different -- he's a  
17 different expert. He's not relevant because Mr. Kohlmann  
18 talks about producers of these videos.

19 MR. HERDMAN: Before we start talking about  
20 Mr. Kohlmann, can we please respond to where we're at?

21 MR. BRYAN: No. I'll just stop talking about  
22 Mr. Kohlmann.

23 MR. HERDMAN: I can be very brief in my response,  
24 and I think when I first started speaking to Your Honor  
25 about what was proffered in this letter regarding

1 Mr. Alterman, pointed to paragraph 8, which was a  
2 description of the foreign fighters that entered into Iraq  
3 in support of the insurgency and a relatively small portion  
4 of the Jordan -- relatively small proportion of Jordanians  
5 that made up that number of are 5,000.

6 I think what Mr. Bryan is describing for The  
7 Court is that paragraph number 8, the logical fallacy, as  
8 Your Honor put it, written large across this entire letter  
9 in that they want to present this evidence to the jury so  
10 that the jury makes an inference based on what is common in  
11 the Middle East, what is normal in the Middle East, and  
12 then apply those inferences to Mr. Amawi.

13 Just imagine, Your Honor, if the government stood  
14 up and proffered the same evidence that Mr. Bryan is  
15 proposing with relation to Mr. Amawi. I would -- I would  
16 never make that argument to Your Honor because it's clearly  
17 improper evidence. It's clearly inadmissible for the  
18 government to come in here and offer some sort of opinion  
19 poll in the least --

20 THE COURT: This is the way things are,  
21 therefore, this is the way they were here.

22 MR. HERDMAN: Correct, Your Honor.

23 And let me just go right back to -- to what  
24 Mr. Sofer and Mr. Hartman discussed because the evidence in  
25 this case is the evidence. And Mr. Bryan wants to be able

1 to argue an inference off that evidence. He's more than  
2 entitled to argue an inference, just as the government will  
3 argue an inference from the evidence, from the evidence  
4 alone, not from some other expert coming in here and  
5 testifying about what the prevailing attitudes in the  
6 Middle East were on the United States.

7 Let's not forget Mr. Amawi is a U.S. citizen,  
8 Your Honor, so for the government to draw an inference off  
9 anything other than what the actual evidence in this case  
10 is would be clearly improper, and I think it's improper for  
11 the defense to be proffering similar expert testimony.

12 And briefly with respect to the new media with  
13 Mr. Alterman's proffered testimony, I think it's very clear  
14 based on this letter that Mr. -- and based on what  
15 Mr. Bryan just spent several minutes talking about,  
16 Mr. Alterman's expertise in the area of satellite  
17 television in the Arab countries, and that's -- there's no  
18 evidence of that in this case. And there's nothing -- it  
19 has nothing to do with satellite television in this case,  
20 it's not at all an issue.

21 But what is very telling about Mr. Alterman's  
22 letter, and I think if you contrast it with the -- the very  
23 detailed reports about specific evidentiary items in this  
24 case that Mr. Kohlmann has proffered with The Court, you  
25 see very quickly that Mr. Alterman is not qualified to

1 discuss specific pieces of evidence, talking about videos  
2 that are actually in evidence before the jury and before  
3 The Court. Mr. Alterman addresses none of these specific  
4 videos in his letter. I don't know that one --

5 THE COURT: I understand.

6 MR. HERDMAN: I don't know that he's qualified  
7 to. There's no evidence of that.

8 There's been nothing proffered with respect to  
9 his qualifications to address these Jihadist videos. It's  
10 described in very general, broad terms, whether he is --  
11 The Court's already made a ruling with respect to general,  
12 broad conclusions that Mr. Kohlmann would draw and the  
13 government would not seek to produce that at this point in  
14 time.

15 So I think -- so I think that when you talk about  
16 this new media, it is -- it is very telling that we're --  
17 that Mr. Bryan's talking in general broad steps, and The  
18 Government gets around to speaking about Mr. Kohlmann, it's  
19 pinpointed on specific exhibits, even, Your Honor. And  
20 we're talking about actual evidence that's before this jury  
21 already.

22 MR. SOFER: Judge, if I may, on a broader scope,  
23 not with respect to this, but I think so the tenor of the  
24 government's arguments applies to all three of these  
25 experts is, we proffered the testimony of one --

1 essentially one expert in this case other than our  
2 translators. The Court looked at that and said, you know  
3 what, United States government, you've gone outside the  
4 bounds of what is permissible here because, again, you're  
5 getting into broad inferences that shouldn't be made, that  
6 we should stick to the specific evidence in the case. The  
7 government agrees with that, we've tailored our  
8 presentation, we've narrowed it, we've focused it, and  
9 we've tried to focus on the specific inferences on the  
10 specific pieces of evidence, as Mr. Herdman has said.

11 All of these experts that are being proffered by  
12 the defense move us in leaps and bounds away from that  
13 concept; that is, here's the evidence, here's the inference  
14 that can be made by it, this is the province for the jury  
15 to determine whether this is intent of these defendants or  
16 not. If we -- my fear is that we open this door and, you  
17 know, I just heard a -- you know, a speech that we want on,  
18 and on which, essentially, is just politics. The case is  
19 not about politics, it should not be about politics, not  
20 about the war in Iraq, it's not about a religion. It's  
21 about violations of the law in this country that these  
22 defendants live. They don't -- they didn't want to be  
23 subject to the United States law. They didn't have to live  
24 in this country. But this is the -- this is where they  
25 lived, this is what they did here.

1           And I think, you know, to open this up the way  
2   that's being suggested, it would be so unbelievably  
3   offensive. These lawyers would be jumping up and down and,  
4   rightfully so, if the government came in here and said, you  
5   know what, 80 percent of the terrorists that have attacked  
6   anywhere in the world are such and such religion, are from  
7   such and such a country, or from such and such a region,  
8   and therefore, it must be that so are these men.

9   Outrageous. That would be an outrageous thing for us to  
10   say. The fact that it comes from the defense doesn't make  
11   it any less outrageous.

12           What I'm saying, Your Honor, is, we open the door  
13   to this, then we're going to end up losing the same thing  
14   from Dr. Shy, we're going to lose what is supposed to be  
15   happening here, which is it to determine whether these men  
16   broke the United States' law in this case based on this  
17   evidence. That's our general position, Judge.

18           MR. BRYAN: Your Honor, if I may.

19           THE COURT: Just briefly, because I want to take  
20   a break. Go ahead.

21           MR. BRYAN: Your Honor, Mr. Herdman commented  
22   that, you know, the judge -- jury's permitted to draw  
23   inferences from the evidence. What we're trying to do,  
24   Your Honor, is present a defense for our client by  
25   presenting evidence, expert testimony, that will provide



1 more evidence for the jury from which to draw inferences.  
2 What The Government basically wants --

3 THE COURT: I agree with that. Otherwise you  
4 wouldn't be talking, but the inference -- I don't see that  
5 the inference, set of inferences you want to have drawn can  
6 properly be connected to this particular defendant, what  
7 he's charged with in this case. And that's the problem I  
8 have.

9 MR. BRYAN: Your Honor, my suggestion would be,  
10 then, that the government shouldn't be able to present any  
11 evidence of what Mr. Amawi says at all if we're not able to  
12 explain his -- his -- his comments.

13 THE COURT: You are -- you are --

14 MR. BRYAN: And they should be able to present  
15 evidence of what Mr. Amawi did. And if that were the case,  
16 I think Your Honor would Rule 29 this case tomorrow because  
17 he did nothing.

18 THE COURT: Probably so, if these tapes weren't  
19 in the case, we wouldn't be here. But anyway, again, you  
20 can present evidence to -- and there is evidence in the  
21 case in which you can argue, if contrary to that which the  
22 government offers.

23 My point is, I don't think you can offer this  
24 particular evidence. And I'm not ruling -- far from it --  
25 that you won't be able to stand up and argue that the jury

1 should reach a conclusion entirely different from that of  
2 the government or much less argue that the government's  
3 failed to meet its burden of proof.

4 And -- let's -- let's take a break for about 15  
5 minutes, and then I'll turn to the other expert offered by  
6 Mr. Amawi.

7 Just put Mr. Doughten's request and the fact that  
8 I'm granting it on the record, please.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

s:/ Angela D. Nixon

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Angela D. Nixon, RPR, CRR

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Date